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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 568

CHARLES EDWARD ANDERSON BERRY,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled cause on October 27, 1961.

OPINION BELOW.

The opinion of the Court of Appeals has not yet been reported and is printed in the Appendix, infra, p. 15.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 27, 1961 (Appendix, infra, p. 22). The jurisdiction of this Court is invoked under 28 U. S. C. A., § 1254 (1).

QUESTIONS PRESENTED.

(1) Whether, in a federal criminal prosecution for a felony in which the government's case is based predominantly on the testimony of one witness, it is error for the trial court to refuse to make a private inspection of the minutes of the grand jury testimony of that witness to ascertain if it contains any inconsistencies or impeaching matter which should be made available to the defense, particularly when the defense counsel has made a specific and timely request during the trial for such private inspection by the court.

(2) Whether the defendant in a federal felony prosecution must first make a showing that inconsistencies or impeaching matter probably exist in the grand jury testimony of the chief prosecuting witness, before the trial court has the duty to make a private inspection of the grand jury transcript after a specific and timely request by the defendant.

(3) Whether the requirement of showing "a particularized need", as established in **Pittsburgh Plate Glass v. United States**, 360 U. S. 395, is necessary where the defendant in a felony prosecution does not demand the right to inspect the grand jury transcript, but only asks that the trial court privately examine the grand jury testimony of the chief prosecuting witness to ascertain if it contains any inconsistencies or impeaching matter which should be made available to defendant.

STATUTE INVOLVED.

United States Code, Title 18, Section 2421:

> "Whoever knowingly transports in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice;
>
> . . . . . .
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

STATEMENT.

The petitioner was convicted by a jury on a single count indictment charging him with knowingly transporting a female from El Paso, Texas, to St. Louis, Missouri, for purposes of debauchery and other immoral practices, in violation of Title 18, United States Code, Section 2421. Petitioner was sentenced to imprisonment for three years and a fine of $5,000.00 (R. 395). On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the judgment (Appendix, infra, p. 22).

Petitioner is a professional entertainer of considerable reknown, having made numerous successful recordings, radio and television appearances, several movies, and many personal appearance tours (R. 227). It was on such a tour that he met the female in question in Juarez, Mexico, located across the river from El Paso, Texas, on December 1, 1959 (R. 15). This female, the chief prose-

cuting witness, testified that her name was Janice Norine Escalanti but that she also used the name of Heba Norine (R. 56), and that she was living in El Paso at that time (R. 58). Both the government and the defense evidence showed, without contradiction, that this female then accompanied petitioner and his group of three musicians, in petitioner's automobile, on the remainder of the tour through some six states and terminating at St. Louis, Missouri, where petitioner lived and had his office and business (R. 25-44, 233). The issue in the case, therefore, was the motive or purpose of the interstate transportation; petitioner denied any immoral purposes and insisted the only reason he brought her to St. Louis was to employ her in petitioner's night club as a check-room attendant (R. 233).

The government's case was based almost entirely on the testimony of the alleged victim, who testified at great length at the trial. She admitted that in El Paso petitioner had offered her the night club job, which was the only expressed reason for her coming to St. Louis (R. 21, 69); she also stated that she accompanied the group on the remainder of the tour only as a means of getting to St. Louis, since she had no funds (R. 69). She worked at each performance on the tour (except one or two) selling photographs for petitioner (R. 70), and actually was employed in the night club in St. Louis as the check-room girl (R. 46). To support the government's contention of immoral motives, she testified that at various places on the tour and frequently in St. Louis the petitioner had intercourse with her (R. 30, 34, 37, 38, 41, 48). Petitioner, on the other hand, denied ever having any immoral relations with the girl, or any intent to have such relations (R. 244, 246, 257, 264).

At the conclusion of the direct examination of Janice Escalanti, counsel for the defense requested the produc-

tion of any prior statements made by the witness to government agents (R. 54), and in addition requested the trial court to make an *in camera* inspection of her grand jury testimony to ascertain if it contains inconsistencies or impeaching matter, as follows (R. 55-56):

> "(Mr. Silverstein): We also at this time request that the government present to the court for the court's private examination the minutes and the record of this witness' testimony before the grand jury so that the court can ascertain whether or not that record and those proceedings contain any testimony which——
>
> The Court: Will the jury please file out?
>
> (Whereupon, the following proceedings were had out of the presence and hearing of the jury):
>
> The Court: With respect to the grand jury, the motion will be overruled. With respect to the statements it will be sustained. You can furnish him the statements.
>
> Mr. Silverstein: Going back to my request for the grand jury minutes, I request that they be delivered to the court for the court's examination in camera for a determination by the court as to whether or not these proceedings contain any matters which conflict or which are contradictory to the witness' testimony here in court, and I want the record to clearly show that we are not requesting at this time for the counsel for the defense to have an opportunity to examine the grand jury proceedings, only that they be presented to the court for the court's examination to ascertain if there is any impeaching or contradictory matter therein.
>
> The Court: I will sustain the motion with respect to the statements that they have that she signed or a memorandum of anything they may have given the

FBI. Insofar as the request to inspect the grand jury minutes is concerned, be overruled."

The cross-examination of this witness elicited many contradictions, of varying degrees of importance (R. 74-76, 82, 83, 94-96, 109-110).

Thereafter, counsel for defense repeated his request for a private inspection by the court of the grand jury testimony (R. 178):

> "At this time I would simply like to renew the request that I made yesterday that the government be ordered to produce for the court's inspection in camera the testimony of the witness, Janice Escalanti, before the grand jury, because during her cross-examination yesterday and this morning there have been brought out many contradictions in her testimony and between her testimony and statement that she has given to the F. B. I., and testimony that she had given in the first trial of this cause, and I think, as a matter of fact, that these many contradictions existing further amplifies the necessity to assure a fair trial for the defendant, that the grand jury testimony of this witness be examined by the court to ascertain if there is any impeaching matter therein, and if there is, then that impeaching matter only be furnished to counsel for the defense."

Again the request was overruled, the trial court stating (R. 179):

> "Request will be denied. I realize, of course, that all you criminal lawyers want to get ahold of what goes on in the grand jury room, but I don't understand, with the exception of perjury, that it is a matter that you're entitled to. As a matter of fact, I don't even know whether the grand jury testimony

here was written up. Wouldn't make any difference as far as my ruling is concerned, whether it was or wasn't. Furthermore, I'm not going to set myself up as passing on the testimony before anybody. If you're entitled to it, you're entitled to see it yourself, it's not up to me to tell you what it is, and in my opinion you're not entitled to it."[1]

The other facts elicited at the trial are not germane to this petition. On appeal before the Eighth Circuit, the refusal of the trial court to examine the grand jury transcript was extensively argued by both sides, as reflected in the opinion (Appendix, infra, p. 16). The Court of Appeals held that "no compelling necessity for the examination by the court, privately or otherwise" was shown; that since the interstate transportation was not controverted, the only issue was immorality; and that obviously no indictment would have been returned unless the witness had testified before the grand jury that she had immoral relations with Berry. Therefore, concluded the appellate court, there is no reason to believe that the grand jury testimony would have differed in any material respect from the trial testimony. The Court's opinion noted, without comment, various decisions of the Second Circuit Court of Appeals which are diametrically opposed to the instant holding.

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[1] Although the government counsel made no comment at the time, it was well known by both counsel that the grand jury testimony was actually already reduced to writing. At a prior trial of this same cause (No. 10,446 in Eighth Circuit, R. 44) same government counsel stated that he did have the grand jury transcript; and in oral argument before the Court of Appeals on the issue, the government admitted it had the transcript of the grand jury testimony at all times.

REASONS FOR GRANTING THE WRIT.

1. The instant case presents the precise issue which this Court noted but refused to consider, because it was not properly raised at the trial, in **Pittsburgh Plate Glass Co. v. United States**, 360 U. S. 395. There the defendant insisted on the unqualified right to have the grand jury records furnished to it for use on cross-examination, a right which is certainly conditional upon the prior showing of a "particularized need", **United States v. Procter & Gamble**, 356 U. S. 677. In the alternative, defendant claimed the trial court should have privately examined the transcript, although no such request was made at the trial. Commenting on this contention, the opinion of this Court observed (360 U. S., at p. 401):

> "The Court of Appeals apparently was of the view that even if the trial judge had been requested to examine the transcript he would not have been absolutely required to do so. It is contended here that the Court of Appeals for the Second Circuit has reached a contrary conclusion. United States v. Spangelet, 258 F. 2d 338. Be that as it may, resolution of that question must await a case where the issue is presented by the record."

It thus appears that this court is cognizant of the importance of this issue but could not resolve it in the **Pittsburgh Plate Glass** case because of the record deficiency. This is further borne out by the fact that, at the very next opportunity by this Court to pass on the issue, certiorari was granted, **Travis v. United States**, 363 U. S. 801. However, when that case was submitted on the merits, it was reversed because of improper venue and a consideration of the procedural issue concerning inspection of the grand jury minutes was therefore precluded, **Travis v. United States**, 364 U. S. 631. The language of the Court

in the **Pittsburgh Plate Glass Co.** case, together with the grant of certiorari in the **Travis** case (in which the Court of Appeals unequivocally held that it was not mandatory for the trial court to make an *in camera* inspection when requested) has led the bench and bar of the nation to the obvious conclusion that the Supreme Court considers this matter of private inspection by the trial court as a vital but unsettled issue which it must ultimately resolve in order to insure fair and uniform criminal procedure throughout the land. The instant case squarely presents this issue for decision; no other matters are raised in this petition. Indeed, if certiorari is now denied and the Eighth Circuit decision allowed to stand, even greater uncertainty will result. The careful distinction drawn in **Pittsburgh Plate Glass Co.** leaves the clear impression that the present issue is one which must be settled by the nation's highest tribunal; lower courts, faced with this very problem in almost every criminal trial, are undoubtedly awaiting the final answer.

2. The decision and opinion of the Eighth Circuit below is in direct and irreconcilable conflict with numerous decisions of the Second Circuit. For many years the latter appellate court has held, without exception, that upon a proper defense request the trial court has a **duty** to make an *in camera* inspection of the grand jury testimony of a principal government witness to ascertain if impeaching matter is contained therein which should be made available to the defense. This rule was carefully described in **United States v. Spangelet**, 258 F. 2d 338 (2nd Circ.), wherein it was clearly explained that such a procedure is wholly independent of the so-called "Jencks statute," 18 U. S. C. A., § 3500, or the holding in **Jencks v. United States**, 353 U. S. 657, neither of which authorizes or prohibits the *in camera* inspection. This decision has been followed and reaffirmed many times in the Second Circuit:

United States v. Zborowski, 271 F. 2d 661; **United States v. McKeever**, 271 F. 2d 669; **United States v. Hernandez**, 282 F. 2d 71 (rehearing denied, 290 F. 2d 86); **United States v. Giampa**, 290 F. 2d 83; **United States v. Santore**, 290 F. 2d 51. In each instance, these opinions declared, either by way of direct holding or dictum, that it is reversible error for the trial court to refuse to make a requested private inspection.

The opinion of the Eighth Circuit herein is based primarily on the court's belief that there was no showing that the grand jury testimony in question would likely reveal any material inconsistencies. This, too, is in direct opposition to the Second Circuit decisions. For example, this same contention was raised by the government and emphatically rejected in **United States v. Zborowski**, supra, in the following language:

> "Even if there were no showing of possible inconsistency in the testimony of a witness in a perjury case, or indeed in any case, where the testimony of such witness is the only direct evidence against the defendant and no valid reason for secrecy exists, the court should upon request examine the grand jury minutes of such a witness for possible inconsistencies . . . **It offends all sense of fairness to first require a showing of possible inconsistency preliminary to examination of the minutes by the trial judge**" (Emphasis added). 271 F. 2d, at p. 666.

Subsequently, in **United States v. Hernandez**, supra, after the government had petitioned for a rehearing and urged this very point (that there was no showing of possible inconsistencies) the Second Circuit again unequivocally repudiated the argument:

> "For neither defendant nor his counsel has the grand jury minutes (indeed the request would not be made if they had them at hand); and to require a bill

> of particulars in support of the request when from the nature of the situation counsel cannot know such details is to deny the rule itself. That we have not done." 290 F. 2d, at pp. 88-89.

Obviously, a sharper and more patent conflict between Courts of Appeal would be difficult to imagine. In fact, the opinion below even acknowledges that the Second Circuit decisions support petitioner's contention, but makes no attempt to distinguish or explain away those decisions. In effect, the court is saying "That may be the law in the Second Circuit, but not in the Eighth Circuit".

This conflict, of course, has been apparent for a long period of time; the Eighth Circuit has now chosen to side with the Fifth, Ninth and Tenth Circuits, who have likewise rejected the decisions of the Second Circuit on this issue. Ever since the latter circuit established its strong doctrine requiring *in camera* inspections, these other courts have criticized and disapproved the rule. For example, **Herzog v. United States**, 226 F. 2d 561 (Ninth Cir.) and **Parr v. United States**, 265 F. 2d 894 (5th Cir.), although both involving defense requests for outright production of grand jury testimony, nevertheless contain dicta indicating that even an *in camera* inspection by the court is a discretionary matter. The **Parr** decision specifically notes the conflict between it and the Second Circuit holdings. Then, of course, **Travis v. United States**, 269 F. 2d 928 (10th Cir.), decided **after** the **Pittsburgh Plate Glass Co.** decision, specifically rejects the Second Circuit holdings, relying partially upon the refusal of the Supreme Court to resolve the issue in the **Pittsburgh** case. As noted before, **Travis** was later reviewed after a grant of certiorari but reversed because of improper venue, so again the *in camera* inspection issue was unresolved.

The present conflict between circuits, sharpened by the Eighth Circuit opinion below, is hopelessly irreconcilable.

A convincing academic argument can probably be made in support of either viewpoint and appears in many of the conflicting opinions herein cited. The Second Circuit precedent is buttressed by the fact that the government has never sought certiorari in any of the cases it lost on this issue; on the other hand, the opposing viewpoint has the support of a greater number of circuits (although the Second has by far the greater number of decisions). To further complicate matters, the Supreme Court granted certiorari in the only two cases which **directly** held against the mandatory *in camera* inspection, **Travis** and **Pittsburgh Plate Glass Co.** But the trial court at the district level must decide these matters consistent with the decisions of its particular circuit, regardless of the Second Circuit, or "majority," or "better" rule. Hence, at present a defendant in the Second Circuit can prepare his case with complete assurance that chief prosecuting witnesses can be impeached if they depart from grand jury testimony. Defendants in the Fifth, Ninth and Tenth Circuits (and now the Eighth Circuit) can expect to be denied any such benefit. Defendants in other circuits can only speculate as to their prospects on the issue, probably with the same degree of accuracy (or chance of correctly predicting the outcome) as they could derive from the toss of a coin.

Only a review and resolution of the issue by the Supreme Court can now end this hopeless conflict and uncertainty in this most vital field of criminal procedure..

3. Even apart from the manifest disagreement among the circuits, and now particularly between the Eighth and Second Circuits, the fair and orderly administration of justice requires a pronouncement from this Court on the issue of *in camera* inspection of grand jury testimony.

This is not a novel or rare issue. It is one which is raised frequently, in virtually every federal criminal trial involv-

ing a critical conflict of testimony. Much can be said in favor of the mandatory *in camera* inspection; on the other hand, petitioner recognizes and appreciates the substantial objections to such a procedure. But regardless of which viewpoint one favors, it cannot be disputed that this issue, now riddled with controversy, is of paramount importance and should be resolved by our highest court.

Each month which passes while this matter remains a puzzle will see dozens of defendants facing juries in legal battles for freedom; many will be denied the benefit which petitioner sought in vain in his trial below. How many who are convicted might have been liberated had their trials taken place in the Second Circuit? This, of course, no one can speculate. Nevertheless, it is a certainty that the instant issue will be raised in many, if not most, of these trials, and that the present status of the law offers little to the trial court and the litigants in the way of reliable guidance.

The uniform and fair administration of justice, particularly in felony prosecutions, requires that the issue be ultimately decided for **all** federal courts with all due dispatch. This can be accomplished best by a review of the instant case by the United States Supreme Court.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari in the above cause should be granted.

Respectfully submitted.

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